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## OVERVIEW OF THE U.S. EXPORT CONTROL SYSTEM

The U.S. Government controls exports of sensitive equipment, software and technology as a means to promote our national security interests and foreign policy objectives. Through our export control system, the U.S. government can effectively:

- Provide for national security by limiting access to the most sensitive U.S. technology and weapons
- Promote regional stability
- Take into account human rights considerations
- Prevent proliferation of weapons and technologies, including of weapons of mass destruction, to problem end-users and supporters of international terrorism
- Comply with international commitments, i.e. nonproliferation regimes and UN Security Council sanctions and UNSC resolution 1540

### Essential Elements of an Effective Export Control System

To effectively implement an export control system, a country must exhibit a broad national commitment to the endeavor. This commitment is first illustrated by making the political decision to adhere to international nonproliferation norms, as defined by various multilateral regimes, and engage solely in responsible arms transfers.

Second, a nation must establish a legal authority to control the export of defense-related and dual-use goods and technologies. This authority would adhere to six legal principles:

- Comprehensive Controls
- Implementing Directives
- Enforcement Power and Penalties
- Interagency Coordination
- International Cooperation
- Protection against governmental dissemination of sensitive business information.

Third, a country should implement regulatory procedures to support export control laws and policies. These procedures should establish clear lines of authority and provide for a list of controlled items. The control list should adhere to international norms (multilateral regime lists and their associated catch-all controls). §The regulations should be clear and easily accessible to exporters in their description of licensing and enforcement policy. The designated authority administering the regulatory regime should review license requests for completeness and clarity. §The regulations should encourage transparency and predictability of governmental decision making, and should give sufficient room for exceptions to policy in the interest of the government.

Fourth, proper enforcement measures should be built into the system. Preventive enforcement is essential, and should include established procedures related to export license applications (i.e. screening the proposed item, quantity, end-use and all parties involved in the transaction for any potential export) and compliance mechanisms (i.e. working in partnership with industry to educate them on how and why -- to monitor and control their own export activity). The ability and authority to interdict and investigate illicit exports are necessary to implement an effective export control system. International cooperation can ensure full compliance with export legislation.

### Nonproliferation Regimes and Arrangements

The U.S. is a member of various multilateral nonproliferation regimes, including:

- Nuclear Suppliers Group (NSG) - With 39 member states, the NSG is a widely accepted, mature, and effective export-control arrangement which contributes to the nonproliferation of nuclear weapons through implementation of guidelines for control of nuclear and nuclear-related exports.
- Zangger Committee - The purpose of the 35-nation Nuclear Non-proliferation Treaty (NPT) Exporters (Zangger) Committee is to harmonize implementation of the NPT requirements to apply International Atomic Energy Agency (IAEA) safeguards to nuclear exports. The Committee maintains and updates a list of equipment and materials that may only be exported if safeguards are applied to the recipient facility (called the "Trigger List" because such exports trigger the requirement for safeguards).
- Missile Technology Control Regime (MTCR) - The 34 MTCR partners have committed to apply a common export policy (MTCR Guidelines) to a common list of controlled items, including all key equipment and technology needed for missile development, production, and operation. MTCR Guidelines restrict transfers of missiles - and technology related to missiles - for the delivery of WMD. The regime places particular focus on missiles capable of delivering a payload of at least 500 kg with a range of at least 300 km -- so-called "Category I" or "MTCR-class" missiles.
- Australia Group (AG) - Objective is to ensure that the industries of the thirty-eight participating countries do not assist, either purposefully or inadvertently, states or terrorists seeking to acquire a chemical and/or biological weapons (CBW) capability.
- Wassenaar Arrangement (WA) - The regime with the most extensive set of control lists; it seeks to prevent destabilizing accumulations of arms and dual-use equipment and technologies that may contribute to the development or enhancement of military capabilities that would undermine regional security and stability, and to develop mechanisms for information sharing among the 34 partners as a way to harmonize export control practices and policies.

### U.S. Export Control Legislation and Authorities

The Arms Export Control Act (AECA) is the cornerstone of U.S. munitions export control law. The Department of State implements this statute by the International Traffic in Arms Regulations (ITAR). All persons or entities that engage in the manufacture, export, or brokering of defense articles and services must be registered with the U.S. government. The ITAR sets out the requirements for licenses or other authorizations for specific exports of defense articles and services. The AECA requires the State Department to provide an annual and quarterly report of export authorizations to Congress. Certain proposed export approvals and reports of unauthorized re-transfers also require congressional notification.

The Export Administration Act of 1979, as amended, authorizes the Department of Commerce, in consultation with other appropriate agencies, to regulate the export or re-export of U.S.-origin dual-use goods, software, and technology. The Department of Commerce implements this authority through the Export Administration Regulations (EAR). In addition to export controls agreed in the multilateral regimes, the Department of Commerce also imposes certain export and re-export controls for foreign policy reasons, most notably against countries designated by the U.S. Secretary of State as state sponsors of international terrorism, as well as certain countries, entities and individuals subject to domestic unilateral or UN sanctions. Additionally, the Department of Commerce administers and enforces regulations that prohibit certain trade and transactions with certain countries, entities, and individuals by U.S. persons or from the United States under the Trading with the Enemy Act and the International Emergency Economic Powers Act.

Various other U.S. agencies have licensing authority for different exports, for example:

- Nuclear - Nuclear Regulatory Commission, Departments of Energy and Commerce
- Trade embargoes & sanctions/Transactions - Department of the Treasury

### U.S. Control Lists and Licensing Procedures

U.S. control lists correspond directly with the lists maintained by the various multinational export control regimes, but are augmented by unilateral controls when necessary to ensure national security and foreign policy imperatives. The three major lists of export-controlled items are the Commerce Control List (CCL), the United States Munitions List (USML), and the Nuclear Regulatory Commission Controls (NRCC).

The CCL includes the following:

- Items on Wassenaar Arrangement Dual-Use List
- Nuclear-related dual use commodities (compiled in the Nuclear Suppliers Group's Nuclear Referral List)
- Dual-use items on Missile Technology Control Regime List

- CW Precursors, biological organisms and toxins, and CBW-related equipment on the Australia Group lists
- Items controlled in furtherance of U.S. foreign policy and other objectives, including anti-terrorism, crime control, Firearms Convention, regional stability, UN sanctions, and short supply reasons
- Unlisted items when destined for specified end-uses or end-users (catch-all controls)

The U.S. Munitions List regulates defense articles and services. §An article or service may be designated as a defense article or service if it:

- a. Is specifically designed, developed, configured, adapted or modified for a military application and
  - i. Does not have predominant civil applications, and
  - ii. Does not have performance equivalent (defined by form, fit, and function) to those of an article or service used for civil applications, or
- b. Is specifically designed, developed, configured, adapted or modified for a military application, and has significant military or intelligence applicability such that control is necessary.

NOTE: The intended use of the article or service after its export is not relevant in determining whether the article or service is controlled on the U.S. Munitions List.

The NRCC regulates:

- Exports of nuclear equipment and materials, such as those in Part I of the NSG Guidelines.

Also, the Department of Energy regulates the provision of assistance for foreign atomic energy activities:

- Under its legal authorities, DOE can authorize U.S. persons under certain circumstances to engage in the production of special nuclear material outside the United States. §Some transfers may take place pursuant to general authorizations in DOE regulations. §Other transfers - including transfers of unclassified nuclear technology related to trigger list items listed in Part I of the Nuclear Suppliers Group Guidelines - require specific authorizations.

Exporters generally must submit a license request with the appropriate agency for any item on one of these lists. License requests typically go through an extensive review process, including review by interested U.S. government agencies, such as the Department of Defense, Department of Energy, the intelligence community, and NASA, as well as interested bureaus within the Department of State. §During this process, the U.S. government reviews:

- the eligibility of the applicant
- all parties involved in the transaction
- appropriateness of the quality and quantity of the proposed export to the end-user and stated end-use
- any legal impediments to the proposed export
- any national security implications presented by the proposed export
- any foreign policy implications, including but not limited to:
  - potential effect on regional stability
  - human rights
  - ensuring compliance with multilateral control regimes.

In 2004, the Office of Defense Trade Controls in the Department of State's Bureau of Political-Military Affairs reviewed approximately 55,000 requests for export licenses. The U.S. Department of Commerce receives some 12,000 to 14,000 dual-use export applications per year. §Both the munitions and dual-use export control systems of the United States allow for license exemptions (or exceptions) when the government has determined that the particular item, value, end-use and end-user do not constitute sufficient risk to require an export license.

In addition to control lists, the U.S. export control system also relies on catch-all controls to ensure that problematic dual-use exports -- which are not otherwise subject to export controls -- are capable of being tracked, discussed with the recipient government, or even denied as an export transaction. §Catch-all regulations incident to the dual-use list prohibit the export without a license of any equipment, software, or technology that would contribute to projects of

proliferation concern. The Export Administration Regulations provide specific identification of particular foreign entities that the U.S. Government designates as end-users of concern. An individual license to export an otherwise non-controlled item is required if an exporter:

- Knows or has reason to believe that an export will be used in a weapons of mass destruction (WMD) program or missile project of concern, or
- Is informed by the Department of Commerce that an export would present an unacceptable risk of use in or diversion to a WMD program or missile project of concern.

Each license application under catch-all controls is reviewed on a case-by-case basis. §If the U.S. Government determines that the export poses an unacceptable risk of use in or diversion to a nuclear proliferation activity, or that the export would make a material contribution to a chemical or biological proliferation activity, or a missile project of concern, the license is denied. §These controls are consistent with AG, MTCR, and NSG catch-all requirements.

### **Exporters: Be familiar with your customers**

Applying common sense is essential in weeding out potentially problematic transfers. Alarms should sound if:

A customer or agent -

- Is reluctant to provide end-use/user information
- Is willing to pay cash for high-value shipments
- Has little background or history in the relevant business
- Appears unfamiliar with the product or its use
- Declines normal warranty/service/installation
- Orders products/quantities incompatible with the relevant business
- Provides vague delivery dates or locations

A shipment involves -

- Private intermediary in major weapons sale
- Freight forwarder designated as consignee/end-user
- Intermediate consignee's business or location incompatible with end-user's
- Shipments directed to trading companies, freight forwarders, or companies with no connection to buyer
- Requests for packing inconsistent with normal mode of shipping
- Choice of circuitous or economically illogical routing, or through multiple countries;

The end-user requests -

- Equipment inconsistent with inventory
- Spare parts in excess of projected needs
- Performance/design specs incompatible with resources or environment
- Technical capability/end-use incompatible with consignee's line of business
- End-use at variance with standard practices
- Middleman from third country to place order
- Refuses to state whether goods are for domestic use, export, or re-export

### **U.S. Mechanisms of Enforcement**

The U.S. government has built in various enforcement mechanisms to ensure compliance with our export control laws. U.S. Customs officials (now part of the Department of Homeland Security) have the authority to check any export or import against its license at the borders. For dual-use items, Department of Commerce officials also investigate violations. Licensing authorities often require pre-license checks and post-shipment verifications.

Criminal and civil penalties for export control violations can be severe. §For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. §In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the ITAR, as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. It should be noted that in many enforcement cases, both criminal and civil penalties are imposed.

### Controls on Brokering Activity

The Arms Export Control Act (AECA) was amended in 1996 to cover brokering activity by all persons (except officers/employees of the USG acting in an official capacity) with respect to the manufacture, export, import, or transfer of any defense articles or defense service on the U.S. Munitions List of the ITAR. §It is noteworthy that this coverage is not limited to U.S. origin defense articles/services, but can also extend to brokering involving foreign defense articles and services. §Under the ITAR, persons engaged in the business of brokering activities are required to register with the Department of State and obtain the applicable authorizations for each brokering transaction. §Brokering activities involving non-munitions items, where known by the perpetrator to be destined for WMD or missile activities, would be subject to U.S. catch-all controls.

As defined in the ITAR, a broker is anyone who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission or other consideration. §"Brokering activities" include the financing, transportation, freight forwarding or taking of any other action that facilitates the manufacture, export, import, or transfer of a defense article or service irrespective of its origin. §This includes activities -- by U.S. persons who are located inside or outside of the U.S., or foreign persons subject to U.S. jurisdiction -- involving defense articles or defense services of U.S. or foreign origin that are located inside or outside of the U.S. §This does not include, however, activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers, and persons exclusively in the business of financing, transporting, or freight forwarding, whose business activities do not also include brokering defense articles or defense services.

Any person registering as a broker must also provide an annual report to the U.S. government enumerating and describing its brokering activities and any exemptions used for other covered activities. §Violations would be punishable under the same penalties noted above for munitions export violations.

### Sanctions

The United States works closely with its friends and allies to halt the transfer of arms-related and proliferation-related items to countries or end-users of concern as well as regions of conflict. § When we receive information on potential transfers of concern, we seek to persuade the countries involved to prevent such transfers. §U.S. laws and regulations also provide for imposition of mandatory and/or discretionary sanctions on governments, entities, or persons involved in transferring certain military equipment or other items of proliferation of concern.

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